IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/ Appellee,	) Supreme Court No. 20070172
-vs-	) District Court No. 51-05-K-2597
Spencer Kelly Brandt, Defendant/ Appellant.	)

BRIEF OF APPELLANT

APPEAL FROM CRIMINAL JUDGMENT AND
AMENDED CRIMINAL JUDGMENT
DATED MAY 17, 2007,
OF NORTHWEST JUDICIAL DISTRICT
THE HONORABLE DOUGLAS L. MATTSON, PRESIDING

MYHRE LAW OFFICE
By: Jessica J. Ahrendt
Attorney at Law
ND Bar ID# 06231
322 Second Street NW, Suite C
P.O. Box 475
Valley City, ND 58072
Telephone: (701) 845-1444
Fax: (701) 845-1888

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

	)
State of North Dakota,	)
Plaintiff/ Appellee,	) Supreme Court No. 20070172
	)
-vs-	) District Court No. 51-05-K-2597
	)
Spencer Kelly Brandt,	)
Defendant/ Appellant.	)

TABLE OF CONTENTS

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/ Appellee,	))) Supreme Court No. 20070172
-vs-	) District Court No. 51-05-K-2597
Spencer Kelly Brandt, Defendant/ Appellant.	))

TABLE OF AUTHORITIES

Cases

Statutes

Other Material

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/ Appellee,	)	Supreme Court No. 20070172
-vs-	)	District Court No. 51-05-K-2597
Spencer Kelly Brandt, Defendant/ Appellant.	)	APPELLANT'S BRIEF

STATEMENT OF THE ISSUES

I. Did the trial court erroneously instruct the jury?

II. Did the trial court err in ruling the knife involved in this case was a dangerous weapon?

STATEMENT OF THE CASE

A. Nature of the case, course of the proceedings, and disposition in the trial court.

[¶1] This is an appeal from a criminal case. On September 30, 2006, the Defendant/Appellant (hereinafter Brandt) was found guilty by a jury on three charges: Aggravated Assault; Knowing or Reckless Interference with a Telephone During an Emergency Call, a lesser included offense; and Felonious Restraint. (App. 20, 23, 24). Brandt was acquitted on two other charges: Terrorizing and Intentional Interference with a Telephone During an Emergency Call. Subsequently, Brandt was sentenced on May 17, 2007. (App. 21, 22).

[¶2] The complaint was filed with the court on December 27, 2005. (App. 6-8). Brandt pled not guilty and requested a jury trial on January 17, 2007, through his attorney. (App. 11-12). Several motions relating to change of judge, withdrawal and

substitution of counsel, and bond related issues were filed with the trial court; they are not relevant to the issues raised on appeal however.

[¶ 3] A jury trial was scheduled to begin September 28, 2006. On September 13, 2006, Plaintiff filed their proposed jury instructions. Defendant's requested jury instructions were filed on September 18, 2006, followed by Brandt's objections to the State's proposed instructions on September 21, 2006.

[¶ 4] A jury trial was held September 28th through 30th, 2006. The jury returned a guilty verdict for three charges, one being a lesser included offense, and a not guilty verdict for the remaining two charges. (App. 20-24).

[¶ 5] Brandt filed an objection to sentencing under N.D.C.C. 12.1-32-02.1 on May 16, 2007. The objection was denied and Brandt was sentenced on May 17, 2007. (Transcript of Sentencing on May 16, 2007 (hereinafter T.S.) p. 5).

[¶ 6] A notice of appeal was filed on June 15, 2007, appealing the May 17, 2007 Criminal Judgment and Amended Criminal Judgment. (App. 45).

B. Statement of facts.

[¶ 7] On December 27, 2005, four complaints were filed with the District Court against Brandt alleging aggravated assault, terrorizing, interference with a 911 call, and felonious restraint. (App.6-8). A formal criminal complaint was filed on January 17, 2007, alleging four counts: (1) aggravated assault; (2) terrorizing; (3) interference with a telephone during an emergency call; and (4) felonious restraint. (App. 9-10). Brandt plead not guilty to all four counts and requested a jury trial. (App.11-12).

[¶ 8] The State filed their proposed jury instructions on September 13, 2006, which proposed the use of pattern jury instructions. Brandt filed his proposed instructions

and objection to the State's requested jury instructions with the court. Brandt objected to the pattern jury instruction for reasonable doubt and presumption of innocence and requested an instruction on true threat be added. The State subsequently filed a response to the objections. The issue of jury instructions was addressed by the court during the voir dire and trial. (Transcript of September 28 through 30, 2007 (hereinafter T.) p. 5, 6, 275, 276, 278-280, 633-652). Brandt requested jury instructions on reasonable doubt, presumption of innocence, and true threat were all denied by the trial court. (T. p. 641, 642, 647-651).

[¶ 9] Brandt was found guilty of three offenses: (1) aggravated assault; (2) knowing or reckless interference with a telephone during an emergency call, a lesser included offence; and (3) felonious restraint. (App. 20, 23, 24). He was acquitted of terrorizing and intentional interference with a telephone during an emergency call. (App. 21, 22).

[¶ 10] Brandt filed a motion and brief to arrest judgment on October 11, 2006. The motion and brief asserted that arrestment of the judgment was required due to the fact that Count 1, aggravated assault, in the Information did not charge an offense. Brandt contended that a knife in and of itself is not a dangerous weapon and therefore Count 1 did not charge an offense. The court issued an Order on November 1, 2006, denying the motion to arrest judgment. (App. 25-29).

[¶ 11] An objection to sentencing under N.D.C.C § 12.1-32-02.1, was filed by Brandt on May 16, 2007[1]. The objection centered on Brandt's assertion that the knife at issue in the case does not meet the definition of a dangerous weapon under N.D.C.C.§

[1] The identical document was also filed on May 17, 2006.

12.1-01-04(6). The trial court denied the motion during the sentencing hearing. (T.S., p. 5).

[¶ 12] The sentencing hearing was held on May 16, 2006. Subsequently, the Criminal Judgment was filed on May 17, 2006, (App. 31-37). with an Amended Criminal Judgment filed the same day to correct a typographical error switching Count 3 and 4 in the Information. (App. 38-44).

[¶ 13] Brandt timely filed an appeal of the Criminal Judgment and Amended Criminal Judgment on June 15, 2007. (App.45).

LAW AND ARGUMENT

A. Jurisdiction

[¶ 14] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provide as follows:

[¶ 15]An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03

> An appeal may be taken by the defendant from:
> 1. A verdict of guilty;
> 2. A final judgment of conviction;
> 3. An order refusing a motion in arrest of judgment;
> 4. An order denying a motion for new trial; or
> 5. An order made after judgment affecting any substantial right of the party.

N.D.C.C. § 29-28-06.

B. Did the trial court erroneously instruct the jury?

[¶ 16] Jury instructions are fully reviewable on appeal, *State v. Stensaker*, 2007 ND 6, ¶ 8, 725 N.W.2d 883 (citations omitted). "To preserve an appellate challenge to a jury instruction, a party must specifically object to a court's proposed instruction." *State*

v. Gresz, 2006 ND 135, ¶ 7, 717 N.W.2d 583 (citations omitted). The North Dakota Supreme Court "review[s] the sufficiency of the evidence for support of a jury instruction in the light most favorable to the defendant." *Gresz*, 2006 ND 135 at ¶ 6.

[¶ 17] Jury instructions must adequately and correctly inform the jury of the applicable law. *Gresz*, 2006 ND 135 at ¶ 7. The Court looks to whether the instructions as a whole are "(1) erroneous, (2) relate to a central subject in the case, and (3) affect a substantial right of the accused." *Stensaker*, at ¶ 8, (citing *State v. Wilson*, 2004 ND, ¶ 11, 676 N.W.2d 98).

1. The trial court erroneously instructed the jury regarding proof beyond a reasonable doubt.

[¶ 18] Brandt objected to the North Dakota pattern jury instruction on reasonable doubt and requested an alternative instruction be given. The pattern jury instruction does not adequately and correctly inform the jury of the appropriate standard of proof. The standard of proof is pivotal in deciding a case.

[¶ 19] Brandt's objection the pattern jury instruction on reasonable doubt was raised in a brief filed on September 21, 2006 and renewed several times during the trial held September 28-30, 2006. (T. 5, 6, 275-280, 633-652). Brandt contends that the pattern jury instruction proposed by the State (1) did not inform the factfinder that the proof must be greater than the preponderance of the evidence standard and the clear and convincing evidence standard and (2) the instruction does not correctly convey the concept of reasonable doubt to the jury and there is a reasonable likelihood that the jury will understand the instruction to allow a conviction based on proof insufficient to meet the standard of proof.

[¶ 20] Both the North Dakota and the United States Supreme Courts have stated that defining reasonable doubt is difficult. *See State v. Schneider* 550 N.W.2d 405, 408 (N.D. 1996); *Victor v. Nebraska*, 511 U.S. 1, 22, 114 S.Ct. 1239 (1994). Nevertheless, "[t]he Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and the trial court[] must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." *Victor*, 511 U.S. at 22.

[¶ 21] The jury instruction on reasonable doubt did not inform the factfinder that the standard of proof in the case is greater then the preponderance of the evidence standard and the clear and convincing evidence standard. Beyond a reasonable doubt is the highest standard of proof in the United States. It gives a ""concrete substance" to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding" and "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979) (internal citations omitted). In the case at hand, Brandt requested the jury instruction on reasonable doubt contain similar comparative language as that used for the clear and convincing evidence standard, a lesser standard.

[¶ 22] In *Addington v. Texas*, 441 U.S. 418, 433, 99 S.Ct. 1804 (1979), the United States Supreme Court held that "[t]o meet due process demands, the standard [of proof] has to inform the factfinder that the proof must be greater then the preponderance-of-the-evidence standard…" in regards to the clear and convincing evidence standard. Additionally, the North Dakota pattern jury instruction on clear and convincing evidence,

NDJI-CIVIL C-1.41 (2002), contains a provision referencing the standard as being higher than proof by the greater weight if the evidence.

[¶ 23] Brandt's proposed jury instruction on proof beyond a reasonable doubt reads:

> "Proof beyond a reasonable doubt" is a higher standard of proof than proof by the "greater weight of the evidence" used in most civil cases, and proof by "clear and convincing evidence" used in civil cases of higher importance such as termination of parental rights or civil commitment. In terms of possibilities and probabilities, you can believe that the accused is possibly or even probably guilty without reaching the very high level of probability of guilt required for proof beyond a reasonable doubt. To reach that level, you need to reach a subjective state of near certitude of the guilt of the accused. To convict, your belief has to be beyond all reasonable doubt.
>
> On the other hand, the State is not required to prove guilt beyond all doubt. Everything is open to possible or imaginary doubt, or fanciful conjecture. You should not imagine doubt to justify acquittal.
>
> A reasonable doubt is one based on reason after you have given full and fair consideration to all the evidence. A reasonable doubt can arise from the evidence itself, from a

lack or insufficiency of evidence, or from no evidence proving an essential element of the crime charged.

(App. 16, 17). The proposed jury instructions were carefully constructed to include the comparison language required by due process under the Federal Constitution and North Dakota Constitution, Article I, Section 12, and as an aid to help understand proof beyond a reasonable doubt.

[¶ 24] Criminal cases have been given the highest standard of proof. Accordingly, the jury instructions on the standard of proof in criminal cases should be given the same, if not greater, due process demands than in cases with a lower standard. It would follow then, that if comparison language is required with a lower standard of proof to satisfy due process, than it would likewise be required with a higher standard.

[¶ 25] In addition to not including the comparison language required under due process, the jury instruction did not correctly convey the concept of reasonable doubt and there is a likelihood that the factfinder will understand the instruction to allow a verdict of guilty based on a lower standard than beyond a reasonable doubt.

[¶ 26] The North Dakota Supreme Court requires that jury instructions adequately and correctly inform the jury of the applicable law, *Gresz*, 2006 ND 135 at ¶ 7, which includes the standard of proof. The court must also "avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." *Victor,* 511 U.S. at 22. The jury instruction on reasonable doubt used in the case at hand does not conform to these requirements. The instruction omits key language needed to fulfill the requirement of being adequate, being correct, and avoiding misleading the jury to convict under a lesser standard.

[¶ 27] The first omission from the pattern jury instruction is any language instructing that reasonable doubt can be from the evidence itself, a lack or insufficiency of evidence, or from no evidence proving an essential element of the crime. The jury instruction used in this case states "[y]ou should find the Defendant guilty only if you have a firm and abiding conviction of the Defendant's guilt based on a full and fair consideration of the evidence presented in the case and not from any other source." (App. 19). This instruction omits the fact that reasonable doubt is "'based on reason which arises from the evidence or lack of evidence.'" *Johnson v. Louisiana*, 406 U.S. 356, 360, 92 S.Ct. 1620 (1972) (citations omitted). The exclusion of language indicating that lack of evidence can be used to establish reasonable doubt is misleading and implants the impression that a lack of evidence has no bearing in deciding if the State's proof is beyond a reasonable doubt.

[¶ 28] The second omission from the pattern jury instruction is language clarifying that guilt must be established beyond all reasonable doubt. The jury instruction used in the case reads: "The State is not required to prove guilt beyond all doubt, but beyond a reasonable doubt." (App.19). This form of instruction does not impress upon the factfinder the notion that guilt must be established beyond <u>all</u> reasonable doubt. *Victor*, 511 U.S. at 28.

[¶ 29] The third omission is language indicating that the jury "needs to reach a subjective state of near certitude of the guilt of the accused." *Victor*, 511 U.S. at 15. The concept of reasonable doubt is difficult to understand and articulate. The concept of near certitude is something that is more concrete and aids the factfinder in understanding the

standard that is to be applied. The language conveys the level of proof that is needed in an understandable format.

[¶ 30] The jury instructions proposed by Brandt sought to cure the deficiencies in the pattern jury instructions proposed by the State. Brandt's instructions adequately and correctly informed the jury of the applicable standard and showed the proper standard required for conviction. Because Brandt's or similar instructions were not used, the instructions lacked the requirements set forth by the Supreme Court.

2. The trial court erroneously instructed the jury regarding presumption of innocence and burden of proof.

[¶ 31] Brandt objected to the North Dakota pattern jury instruction used in this case on reasonable doubt and requested an alternative instruction be given. The proposed pattern jury instruction does not adequately and correctly inform the jury of the presumption of innocence. The concept of presumption of innocence and the burden of proof are cornerstones of the American justice system. A jury instruction that does not adequately and correctly convey the presumption and burden to the jury serves to dilute the state's burden of proof and diminish the presumption of innocence.

[¶ 32] The State's instructions on presumption of innocence and burden of proof are skeletal. Given the great importance of a defendant's right to the presumption of innocence, such a skeletal jury instruction does not adequately inform the jury. It is important to impart to the jury the presumption that the defendant is presumed innocent until proven beyond all reasonable doubt, based on the evidence or lack thereof and not on surmises, suspicion, or inferences. *See Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct.

1930 (1978). The jury instruction objected to and used in this case does not impart the importance of the presumption and the burden.

[¶ 33] This instruction, like the instruction for proof beyond a reasonable doubt, omits language indicating that reasonable doubt is "'based on reason which arises from the evidence or lack of evidence.'" *Johnson*, 406 U.S. at 360 (citations omitted). The omission of such language gives the false impression that that lack of evidence does not affect the burden of proof beyond a reasonable doubt.

C. Did the trial court err in its determination that the knife involved in this case was a dangerous weapon?

[¶ 34] The trial court made a determination, if not explicitly, then implicitly, that the knife allegedly used in the case at hand was a dangerous weapon. The determination's impact flowed through the entire proceedings from the charges to the sentencing to post-trial motions.

1. The trial court erred in sentencing Brandt under Section 12.1-32-02.1, N.D.C.C.

[¶ 35] The Information filed with the court indicated that the penalty in part for the offenses charge included Section 12.1-32-02.1, N.D.C.C., which requires mandatory prison terms for armed offenders. (App. 13, 14). If sentenced under the statute, a minimum sentence of two years would be imposed. N.D.C.C. § 12.1-32-02.1. Brandt filed an objection to the sentencing under 12.1-32-02.1. The objection was heard and denied during the sentencing hearing held in May, 2007. (T.S., p. 3-5).

[¶ 36] The definition of a dangerous weapon is contained in Section 12.1-01-04(6), which lists the general definitions for use in the chapter. Under that section,

> "Dangerous weapon" means, but is not limited to, any switchblade or gravity knife, machete, scimitar, stiletto, sword, or dagger; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles, or sand club; any slungshot; any bow and arrow, crossbow, or spear; any weapon which will expel, or is readily capable of expelling, a projectile by the action of a spring, compressed air, or compressed gas including any such weapon, loaded or unloaded, commonly referred to as a BB gun, air rifle, or CO2 gun; and any projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas, or substance.

N.D.C.C. § 12.1-01-04(6). The items contained in the list are designed and/or manufactured with the intent that they be used as weapons. The item at issue in this case, an ordinary kitchen knife, was not designed or manufactured with that intent. The type of knife used has some bearing on whether it was a dangerous weapon or not.

[¶ 37] While varieties of knives in other cases have been deemed dangerous weapons, they can be distinguished from the knife in this case. For example, the knife used in *State v. Wika*, was a butcher knife. *State v. Wika*, 1998 ND 33, ¶2, 574 N.W.2d 831. A butcher knife is commonly larger and heavier than the small kitchen knife which was used in the case at hand.

[¶ 38] The knife at issue was a simple, small, kitchen knife. The purpose, design, and manufacturing of it was not for use as a weapon such as a sword or dagger, but rather for use as a kitchen utensil. As such, it should not have been deemed to be a dangerous weapon and the court erred in sentencing him under Section 12.1-01-04(6).

2. The trial court erred in denying Brandt's Motion to Arrest Judgment.

[¶ 39] Brandt filed a Motion and Brief to Arrest Judgment with the district court on October 11, 2006. The Motion alleged Count 1 of the Information did not charge an offense. The Motion was filed pursuant to Rule 34, N.D.R. Crim.P. which provides that a court must arrest judgment if the information does not charge an offense.

[¶ 40] The Information must contain a "written statement of the essential elements of the offense." *State v. Frankfurth*, 2005 ND 167, ¶7, 704 N.W.2d 564(citations omitted). The essential elements of an offense are (1) the forbidden conduct; (2) the attendant circumstances specified in the definition and grading of the offense; (3) the required culpability; (4) any required result; and (5) the nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue. *Id.* (citing N.D.C.C. § 12.1-01-03(1)).

[¶ 41] The definition of dangerous weapon, found under 12.1-01-04, N.D.C.C., does not include "a knife". Count 1 of the Information charged Brandt with aggravated assault with a dangerous weapon, to wit, "a knife". A knife, however, in and of itself, is not a dangerous weapon. Therefore, no offense was charged.

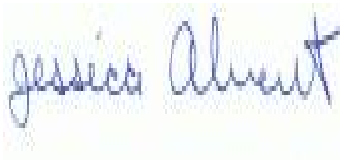
[¶ 42] The definition of dangerous weapon used by the trial court in combination with Section 12.1-01-04, N.D.C.C., was from Section 62.1-01-01, N.D.C.C. This definition should not be used however. Chapter 12.1 is the criminal code and derives the definitions used under it from 12.1-01-04. Title 62.1 is the weapons code. The Information charged Brandt under the criminal, not the weapons code. Accordingly, Section 62.1-01-01 does not apply to the charges and should not be used to provide a definition under another chapter when one is already provided.

[¶ 43] A knife is not defined as a dangerous weapon under the criminal code. As such, the Information listing a knife to fulfill the required element of use of a dangerous weapon is in err and does not charge an offense.

CONCLUSION

[¶ 44] Based on the facts and law provided in Issues I and II, the Amended Criminal Judgment entered by the District Court should in all things be REVERSED and the case remanded for a new trial.

Dated this 29th day of October, 2007.



Jessica J. Ahrendt
Attorney at Law
Myhre Law Office
ND Bar ID#: 06231
322 Second Street NW Suite C
P.O. Box 475
Valley City, ND 58072
Telephone: (701) 845-1444
Fax: (701) 845-1888
Attorney for Defendant/ Appellant